

**EXHIBIT GC056**

**CAUSE NO. 22-CV-0675**

|                                               |   |                                          |
|-----------------------------------------------|---|------------------------------------------|
| <b>SALT &amp; PEPPER RESTAURANTS, INC.,</b>   | § | <b>IN THE DISTRICT COURT</b>             |
| <b>Plaintiff</b>                              | § |                                          |
|                                               | § |                                          |
| <b>v.</b>                                     | § | <b>GALVESTON COUNTY, TEXAS</b>           |
|                                               | § |                                          |
| <b>TIGHT ENDS SPORTS BAR &amp; GRILL, LLC</b> | § |                                          |
| <b>and TIMOTHY DUNGAN,</b>                    | § |                                          |
| <b>Defendants</b>                             | § | <b>56<sup>th</sup> JUDICIAL DISTRICT</b> |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND OBJECTION TO EVIDENCE**

Defendants Timothy Dungan and Tight Ends Sports Bar & Grill, LLC file this response to the second evidence objections made by Plaintiff.

**RESPONSE**

1. Plaintiff has objected to the admission of Defendants' business record on the basis that it does not satisfy Texas Rule of Evidence 902(10).

2. The parties agree that in order to introduce a record created by a third-party, the proponent must establish that: (a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the documents; and (c) the circumstances otherwise indicate the trustworthiness of the document. *Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. App. 2010).

3. The business record satisfies this standard.

4. As stated in Dungan's declaration, the offered document was incorporated and kept in the course of the testifying witness's business. Specifically, the affidavit states that "the record is incorporated and kept in the course of regularly conducted business activity, and it is the regular practice of the business activity to make the record" and that "Tight Ends often enquires about its current account balances with Prosperity Bank and receives written balance information in response. These records are incorporated by Tight Ends and kept in the course of

regularly conducted business activity.” These written responses are received as PDFs, electronic bank statements, and balance summary pages such as the one produced by Defendants. The document satisfies part (a).

5. As stated in Dungan’s declaration, Tight Ends typically relies upon the accuracy of the contents of the documents that it receives from or generates using information from Prosperity Bank. Specifically, the declaration states that “Tight Ends typically relies upon the accuracy of the content of documents from the bank in order to allocate its capital and maintain positive cash flow.” The document satisfies part (b).

6. Finally, as stated in Dungan’s declaration, the circumstances otherwise indicate the trustworthiness of the document, where Dungan testified under penalty of perjury that he “logged in to my account using my secure username and password in order to check my account balance information and the record in question was produced in direct response by Prosperity Bank’s application (with which I regularly interact) and saved to my device.” *See* Dungan Declaration, p. 2. The document satisfies part (c).

7. Defendants also direct the Court’s attention to *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481 (Tex. App. 2008) relying upon *Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982), which held that “a document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business.”

8. Here, the Dungan declaration specifically states that he “verified the facts contained in the record by logging in to my secure account application with the bank. The balances were the same.” The document satisfies *Martinez*.

**PRAYER**

Satisfying the predicate for either method of admissibility, Defendants ask that Plaintiff's second evidence objection be overruled.

Respectfully submitted,

**John Henry & Associates, PLLC**

/s/ John P. Henry

John P. Henry

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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on the parties listed below on this 30<sup>th</sup> day of July, 2022.

/s/ John P. Henry  
John P. Henry

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John Henry on behalf of John Henry

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Envelope ID: 66824948

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Associated Case Party: Salt & Pepper Restaurants, Inc.

| Name            | BarNumber | Email                 | TimestampSubmitted   | Status |
|-----------------|-----------|-----------------------|----------------------|--------|
| Preston TKamin  |           | pkamin@grayreed.com   | 7/30/2022 1:21:32 AM | SENT   |
| Tyler J.McGuire |           | tmcguire@grayreed.com | 7/30/2022 1:21:32 AM | SENT   |
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Associated Case Party: Tight Ends Sports Bar & Grill, LLC

| Name       | BarNumber | Email                | TimestampSubmitted   | Status |
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| John Henry |           | jhenry@jhenrylaw.com | 7/30/2022 1:21:32 AM | SENT   |